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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	F071507 (Merced Super. Ct. No. 14JL-00030-A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. David W. Moranda, Judge.

R. Randall Riccardo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Peña, J., and Smith, J.

The court adjudged J.T. a ward of the court after it sustained allegations charging J.T. with lewd and lascivious conduct with a child under the age of 14 (count 1, Pen. Code, § 288, subd. (a)),[1] attempted lewd and lascivious conduct with a child under the age of 14 (count 2, §§ 664, 288, subd. (a)), and annoying a child under the age of 18 (count 3, § 647.6, subd. (a)(1)).

On appeal, J.T. contends the court erred (1) in calculating his maximum term of confinement (MTC) because it violates section 654 and (2) by its failure to orally state his MTC on the record at his disposition hearing. Although we reject J.T.'s contentions and affirm the court's jurisdictional findings, we will vacate the court's disposition order and remand the matter back to the juvenile court for further proceedings.

FACTS

On December 24, 2014, at approximately 3:45 p.m., Merced Police Officers Ronald Luker and Timothy Gaches responded to a vacant residence on a trespassing call. Officer Luker looked through a window and saw a 10-year-old girl straddling 16-year-old J.T., who was wearing shorts and a shirt.[2] He knocked on the window and the girl ducked down. Officer Luker entered the house through an open window, and J.T. let him into the room where the officer had seen him and the girl. Meanwhile, Officer Gaches positioned himself in front of the window where Officer Luker had seen the girl straddling J.T. Through a partially opened closet door, Officer Gaches saw the girl pulling her pants up and that she was nude from her knees to her waist.

J.T. told Officer Luker the girl was in the closet. Officer Luker looked in the closet and saw that the girl was now wearing pants and a shirt and was putting a jacket on.

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1 All further statutory references are to the Penal Code unless otherwise noted.

2 J.T.'s shoes, pants, and belt were later found in a closet.

J.T. told Officer Luker he was at the house smoking marijuana. When asked why he and the girl had their clothes off, J.T. stated his pants were too tight and he was scratching himself.

Officer Gaches interviewed the girl. When first questioned, she did not say anything about J.T. touching her. However, she eventually stated she had gone to the house to look for a friend, and J.T. told her to take her pants off and assisted her. The girl also stated J.T. tried to touch her. When Officer Gaches asked where, the girl looked down between her legs and said in her "privates" (count 2). The girl further stated that, while attempting to touch her "privates," J.T. also put his hand up her shirt and touched her bare breast (count 1). J.T. then began masturbating (count 3).

On January 16, 2015, the district attorney filed a petition charging J.T. with the three counts the court sustained.

On March 4, 2015, in sustaining the three counts the court stated:

> "I do find beyond a reasonable doubt that Count One, the lewd act upon a child, is found true. I find Count Three, the misdemeanor child molest or annoyance, really, is true by a reasonable doubt [*sic*]. And I also found if you -- Count Two, it's odd a little bit the way it's charged. I find it true, but I find the same incident what I'm relying on to find Count One, Two, and Three, all true beyond a reasonable doubt. So when we get to a disposition, Count Two and Three are 654."

At J.T.'s disposition hearing on March 19, 2015, the court adjudged J.T. a ward of the court, removed him from his grandmother's custody, and ordered him held in juvenile hall pending placement in a suitable group home. Although the court did not state J.T.'s MTC on the record, it signed a placement order prepared by the probation department that set J.T.'s MTC at nine years four months, which included unstayed terms imposed on counts 2 and 3.[3]

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[3] Although the court did not state how it calculated J.T.'s MTC, the only way it could arrive at an MTC of nine years four months is by imposing the aggravated term of eight years on J.T.'s molestation offense in count 1 (§ 288, subd. (a)); a one-year term on

DISCUSSION

The Section 654 Issue

J.T. contends that, because his crimes occurred during a continuous course of conduct and the court did not make an express finding that each offense had a separate objective, the court was compelled to apply section 654 and stay the terms for counts 2 and 3 in calculating his MTC. J.T. acknowledges that section 654 generally does not apply to sex acts that occur during a single incident (*People v. Harrison* (1989) 48 Cal.3d 321 (*Harrison*)). He contends, however, that this exception applies only when the offenses involved are violent sex offenses listed in section 647.6, subdivision (e).[4] We disagree.

> "Section 654 provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' The section 'applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction.'

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his attempted molestation offense in count 2, one-half of one-third the middle term of six years (§§ 664 & 288, subd. (a)); and four months on his misdemeanor annoying a child offense (count 3), one-third the one-year term for that offense (§ 647.6, subd. (a)(1)).

[4] Section 667.6 provides for enhanced punishment for offenses listed in subdivision (e). Subdivision (e) states that this section shall apply to the following offenses: [¶] "(1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261. [¶] (2) Spousal rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of Section 262. [¶] (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1. [¶] (4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286. [¶] (5) Lewd or lascivious act, in violation of subdivision (b) of Section 288. [¶] (6) Continuous sexual abuse of a child, in violation of Section 288.5. [¶] (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a. [¶] (8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289. [¶] (9) As a present offense under subdivision (c) or (d), assault with intent to commit a specified sexual offense, in violation of Section 220. [¶] (10) As a prior conviction under subdivision (a) or (b), an offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision."

> [Citation.] Generally, whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]
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> "However, the rule is different in sex crime cases. Even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. ….
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> "*But, section 654 does not apply to sexual misconduct that is 'preparatory' in the general sense that it is designed to sexually arouse the perpetrator or the victim*. [Citation.] That makes section 654 of limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. As our Supreme Court has stated, '[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally "divisible" from one another under section 654, and separate punishment is usually allowed. [Citations.]' [Citation.] If the rule were otherwise, 'the clever molester could violate his victim in numerous ways, safe in the knowledge that he could not be convicted and punished for every act.' [Citation.] Particularly with regard to underage victims, it is inconceivable the Legislature would have intended this result." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006, italics added.)

At J.T.'s jurisdictional hearing the court stated that section 654 applied to counts 2 and 3. However, it apparently changed its mind by the time it signed an order at J.T.'s disposition hearing setting his MTC at nine years four months, which included unstayed terms on counts 2 and 3. The court reasonably could have found that J.T. committed two preparatory acts designed to arouse him or the victim when he attempted to touch the victim between her legs (count 2) and when he touched her breast (count 1). It also reasonably could have found that neither of the acts underlying counts 2 and 3 were incidental to or the means by which J.T. committed the lewd conduct with a child under the age of 14 offense he was adjudicated of in count 1. Thus, we conclude section 654 did not prohibit the court from using the terms for counts 2 and 3 in calculating his MTC.

Moreover, there is no merit to J.T.'s contention that section 654 is inapplicable only when a defendant commits the violent offenses listed in section 647.6. In *People v.*

Bright (1991) 227 Cal.App.3d 105, the defendant was convicted of 30 counts of violating section 288, subdivision (a). (*Bright, supra*, at p. 106.) Five of these counts arose out of an incident that involved kissing (counts 1 & 6), oral copulation (count 2 & 3), and sodomy (count 5). Six of them arose out of a second incident involving caressing, fondling, kissing, and masturbation of the victim (counts 13, 17 & 19) and oral copulation and sodomy (counts 14, 15, 16, & 18). (*Id.* at pp. 107-108.) The trial court sentenced the defendant to an aggregate term of 35 years that included consecutive or concurrent terms on each of the above counts. (*Id*. at p. 106.) In rejecting the defendant's claim that any punishment imposed on counts 1, 6, 13, 17, and 19 should be stayed pursuant to section 654, the court relied on *Harrison*, *supra*, 48 Cal.3d at pages 334-338. (*Bright*, *supra*, at p. 110.)

In *People v. Madera* (1991) 231 Cal.App.3d 845 the defendant committed an undefined lewd act that violated section 288, subdivision (a) (touching or rubbing the victim's penis) during the same course of conduct during which he committed one or more defined code violations (oral copulation and/or sodomy). (*Madera, supra*, at pp. 848, 854.) In finding that section 654 did not prohibit the trial court from imposing sentence on both the section 288, subdivision (a) violation and on the defined code violations this court stated:

> "[T]he probability that an undefined sex act may occur in the same transaction as a defined sex act does not render it 'incidental,' nor does it insulate the undefined sex act from separate punishment. The distinction for punishment purposes between undefined acts designed generally to arouse and those intended directly to facilitate defined sex acts recognizes the relatively greater culpability of the defendant who commits the former. The reason for the distinction is readily evident. The undefined act is a separate insult to the body -- and the spirit -- of an unwilling victim or a victim who is statutorily protected by law because of his or her minority, or both. The culpability of the perpetrator is not diminished by the fact the intrusion is 'undefined' in the law." (*Id.* at p. 855.)

In accord with the above authorities, we conclude that the trial court did not violate section 654 when it used the terms imposed on counts 2 and 3 to calculate J.T.'s MTC. However, since the court originally stated that section 654 applied to counts 2 and 3 and it never stated why it changed its mind, it appears that the failure to apply section 654 to any of the counts may have been an oversight. In view of this, we will remand the matter to the trial court so that it may clarify whether it intended to apply section 654 to any of the counts and, if so, for it to recalculate appellant's MTC.

The Trial Court's Failure to Pronounce J.T.'s MTC Orally at the Disposition Hearing

Welfare and Institutions Code section 726, subdivision (d)(1) provides:

> "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court."

California Rules of Court, rule 5.795(b), provides:

> "If the youth is declared a ward under [Welfare and Institutions Code] section 602 and ordered removed from the physical custody of a parent or guardian, the court must specify and note in the minutes the maximum period of confinement under [Welfare and Institutions Code] section 726."

In *In re Julian R.* (2009) 47 Cal.4th 487 the Supreme Court held that the specification of the MTC in a commitment order "would comply with the court's statutory duty to 'specify,' … the minor's [MTC]."

The court, here, signed a placement order that set J.T.'s MTC at eight years nine months. Accordingly, we also reject J.T.'s contention that the court erred by its failure to state his MTC orally at his disposition hearing. Nevertheless, since the court did not memorialize J.T.'s MTC in the minutes of his disposition hearing, we will direct the juvenile court to issue an amended minute order that corrects this error.

DISPOSITION

The court's disposition order of March 19, 2015, is vacated and the matter remanded to the juvenile court for it to clarify whether section 654 applies to any of the offenses J.T. was adjudicated of. If the court finds that section 654 applies to either counts 2 or 3 or both, it shall modify his MTC accordingly, reinstate its disposition order as modified, and issue an appropriate minute order. If the trial court finds that section 654 does not apply to any of J.T.'s offenses, it will reinstate its original disposition order and issue an amended minute order for J.T.'s March 19, 2015, disposition hearing that memorializes the MTC of nine years four months the court set for him at that hearing. In all other respects, the judgment is affirmed.